

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

E. Ernest Goldstein
and Peggy R. Goldstein

:

:

AFFIDAVIT OF MAILING

for Redetermination of Deficiency or for Refund of :
Personal Income Tax under Article 22 of the Tax
Law for the Years 1974 through 1977 and New York :
City Non-Resident Earnings Tax under Chapter 46,
Title U of the Administrative Code of the City of :
New York for the Years 1976 and 1977.

State of New York
County of Albany


Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 26th day of November, 1982, he served the within notice of Decision by ~~certified~~ mail upon E. Ernest Goldstein, and Peggy R. Goldstein the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

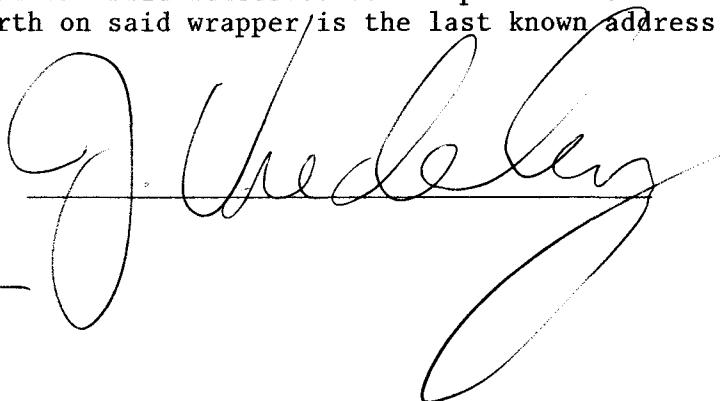
E. Ernest Goldstein
and Peggy R. Goldstein
Armorial II-2CH 1884
Villars-S-Ollow, SWITZERLAND

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
26th day of November, 1982.


AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
E. Ernest Goldstein	:	
and Peggy R. Goldstein	:	AFFIDAVIT OF MAILING
for Redetermination of Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax	:	
Law for the Years 1974 through 1977 and New York	:	
City Non-Resident Earnings Tax under Chapter 46,	:	
Title U of the Administrative Code of the City of	:	
New York for the Years 1976 and 1977.	:	

State of New York
County of Albany

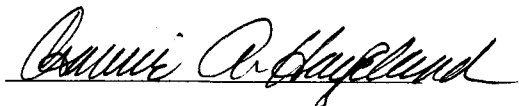
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 26th day of November, 1982, he served the within notice of Decision by certified mail upon Emilio A. Dominiami the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Emilio A. Dominiami
Coudert Bros., Pan Am Bldg.
200 Park
New York, NY 10017

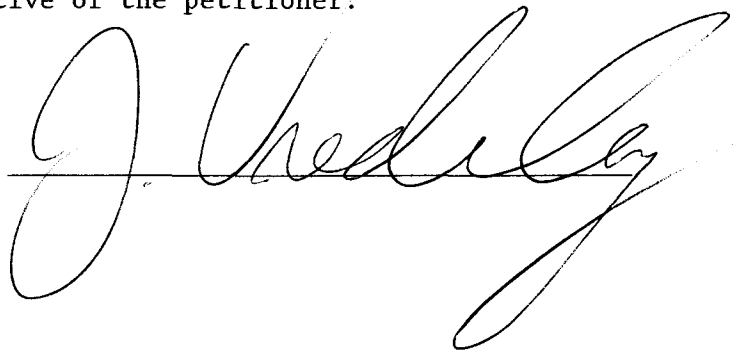
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
26th day of November, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

November 26, 1982

E. Ernest Goldstein
and Peggy R. Goldstein
Armorial II-2CH 1884
Villars-S-Ollow, SWITZERLAND

Dear Mr. & Mrs. Goldstein:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 & 1312 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Emilio A. Dominiami
Coudert Bros., Pan Am Bldg.
200 Park
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
E. ERNEST GOLDSTEIN AND PEGGY R. GOLDSTEIN : DECISION
for Redetermination of Deficiency or for Refund :
of Personal Income Tax under Article 22 of the :
Tax Law for the Years 1974 through 1977 and New :
York City Non-Resident Earnings Tax under :
Chapter 46, Title U of the Administrative Code :
of the City of New York for the Years 1976 and :
1977. :

Petitioners, E. Ernest Goldstein and Peggy R. Goldstein, Armorial II-2CH 1184, Villars-S-Ollow, Switzerland, filed a petition for redetermination of deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1974 through 1977 and of New York City non-resident earnings tax under Chapter 46 Title U of the Administrative Code of the City of New York for the years 1976 and 1977 (File Nos. 22952, 25896 & 29695).

A formal hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 24, 1981 at 1:15 P.M. Petitioners appeared by Emilio A. Dominianni, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Kevin Cahill, Esq., of counsel).

ISSUES

I. Whether the nonresident petitioners are entitled to exclude for purposes of the New York State personal income tax and New York City nonresident earnings tax all or part of the income excluded under section 911 of the Internal Revenue Code (pertaining to citizens or residents living abroad).

II. Whether the late filing penalty for 1977 was properly imposed.

FINDINGS OF FACT

(Findings of Fact Nos. 1 through 12 were stipulated by the parties)

1. During the taxable years 1974 through 1977, petitioner, E. Ernest Goldstein (hereinafter "petitioner" will refer only to E. Ernest Goldstein) was a partner in the New York law firm of Coudert Brothers and the French law partnership of Coudert Freres.

2. a. Coudert Brothers had, during the years in issue, in addition to its New York Office, offices in several locations both within and without the United States.

b. Coudert Freres is the law firm which conducted the practice in Paris, France.

3. Throughout the taxable years 1974 through 1977, petitioner was engaged in the practice of law in the Paris office of Coudert Freres.

4. Petitioner and his wife maintained no place of abode, permanent or otherwise, in, and were not residents of, New York at any time during 1974 through 1977.

5. At all times during 1974 through 1977, petitioner and his wife maintained a permanent place of abode in, and were bona fide residents of, France.

6. For each of the years in issue, petitioner had earned income from foreign sources which qualified for the \$25,000.00 exclusion from gross income provided by section 911 of the Internal Revenue Code ("IRC §911 exclusion") as then in effect.

7. a. During each of the relevant years, petitioner's distributive share of partnership income from Coudert Brothers allocable to New York sources was as follows:

<u>YEAR</u>	<u>DISTRIBUTIVE SHARE</u>	<u>PARTNERSHIP ALLOCATION FACTOR</u>	<u>SHARE ALLOCABLE TO NEW YORK</u>
1974	\$104,352	72.60%	\$75,760
1975	102,637	69.25%	71,076
1976	107,840	70.94%	76,502
1977	124,722	68.67%	85,647

b. During each of the relevant years, no part of petitioner's share of partnership income from Coudert Freres was allocable to New York.

8. Petitioner paid and incurred in each of the years in issue unreimbursed business expenses and Keogh Plan contributions attributable to both Coudert Brothers and Coudert Freres income. The total of these items is allocable between income from Coudert Brothers and Coudert Freres on a proportionate basis.

9. Petitioner had New York modifications (increases in income) resulting from New York unincorporated business tax which is allocable entirely to Coudert Brothers income.

10. For each of the years 1974 through 1977, petitioner's New York adjusted gross income, including all adjustments other than IRC §911 exclusion, is as follows:

1974

New York Distributive Share (\$104,352 x 72.60%)	\$75,760.00
Less:	
Unreimbursed Business Expenses (\$4,284 x 72.60%)	(3,110.00)
Keogh Plan (\$4,908 x 72.60%)	(3,563.00)
Add:	
Partnership Modifications (\$2,147 x 72.60%)	<u>1,559.00</u>
New York Adjusted Gross Income Before IRC §911 Exclusion	<u>\$70,646.00</u>

1975

New York Distributive Share (\$102,637 x 69.25%)	\$71,076.00
Less:	
Unreimbursed Business Expenses (\$4,198 x 69.25%)	(2,907.00)
Keogh Plan (\$4,320 x 69.25%)	(2,992.00)
Add:	
Partnership Modifications	<u>1,684.00</u>
New York Adjusted Gross Income Before IRC §911 Exclusion	<u>\$66,861.00</u>

1976

New York Distributive Share (\$107,840 x 70.94%)	\$76,502.00
Less:	
Unreimbursed Business Expenses (\$3,649 x 70.94%)	(2,589.00)
Keogh Plan (\$4,981 x 70.94%)	(3,534.00)
Add:	
Partnership Modifications (\$3,807 x 70.94%)	<u>2,701.00</u>
New York Adjusted Gross Income Before IRC §911 Exclusion	<u>\$73,080.00</u>

1977

New York Distributive Share (124,772 x 68.67%)	\$85,647.00
Less:	
Unreimbursed Business Expenses (\$4,102 x 68.67%)	(2,817.00)
Keogh Plan (\$5,374 x 68.67%)	(3,690.00)
Add:	
Partnership Modifications (\$3,920 x 68.67%)	<u>2,692.00</u>
New York Adjusted Gross Income Before IRC §911 Exclusion	<u>\$81,832.00</u>

11. For the 1977 taxable year, petitioner was also entitled to a New Jobs Credit in the amount of \$1,327.00.*

12. Petitioner filed form 2688 and obtained from the Internal Revenue Service an extension of time until August 15, 1978 in which to file his Federal income tax return for the year ended December 31, 1977.

13. Internal Revenue Service News Release IR-2040, dated September 29, 1978 granted an extension of time to file 1977 federal income tax returns to all taxpayers who were residing or travelling outside the United States and Puerto Rico on April 17, 1978 and who also qualified for the foreign earned income exclusion for the tax year 1977 to November 15, 1978.

14. Petitioner and his wife were residing outside the United States and Puerto Rico on April 17, 1978.

15. Petitioner and his wife filed timely New York State income tax nonresident returns for the years 1974, 1975 and 1976. They filed a timely City of New York Nonresident Earnings Tax Return for 1976. Their 1977 New York State Income Tax Nonresident Return and City of New York Nonresident Earnings Tax Return were filed on November 15, 1978.

16. The partners of Coudert Brothers and Coudert Freres are the same and hold the same percentage of ownership in each partnership.

17. The \$25,000.00 Federal exclusion was applied to the petitioner's total earnings from the two partnerships.

18. The Audit Division issued statements of audit changes and notices of deficiency to petitioner and his wife as follows:

- a) On April 4, 1978, a Notice of Deficiency was issued to petitioner and his wife for \$7,696.27 in additional New York State personal income tax due, plus interest for the years 1974 and 1975.

* Refers to the modification provided for by section 612(c)(15) of the Tax Law.

b) On April 5, 1979 a Notice of Deficiency was issued to petitioner and his wife for \$3,908.90 in additional New York State personal income tax and \$162.50 in additional New York City nonresident earnings tax due, plus interest for the year 1976.

c) On January 25, 1980, a Notice of Deficiency was issued to petitioner for \$3,286.40 in additional New York State personal income tax and \$180.81 in additional New York City nonresident earnings tax for 1977 plus penalties under section 685(a)(1) of the Tax Law of \$520.16 for failure to file a timely return, as well as interest.

Petitioner and his wife protested the deficiencies insofar as they 1) disallowed the use of the IRC §911 exclusion which petitioner had applied against income from Coudert Brothers for each year; and 2) imposed the penalty for failure to file a timely return for the year 1977.

Other adjustments made by the Audit Division have apparently not been contested (i.e. adjustments relating to Keogh Plan, unincorporated business tax modifications, disallowance of deductions from self-employment earnings for New York City non-resident earnings tax purposes, etc.).

CONCLUSIONS OF LAW

A. That under section 61 of the Internal Revenue Code, a United States citizen, regardless of his residence, must include in his gross income all of his items of income whether they are from United States sources or from foreign sources. Section 911 of the Internal Revenue Code provides an exception to this general rule. For the tax years at issue, Internal Revenue Code section 911 allows the petitioner to exclude from his federal gross income up to \$25,000.00 in compensation for personal services performed in a foreign country. Therefore, the petitioner's federal adjusted gross income for each of the tax years at issue properly excludes \$25,000.00 under Internal Revenue Code section 911.

B. That the starting point for determining the New York adjusted gross income of a nonresident is his Federal adjusted gross income from which the items of income, gain, loss and deduction, including any partnership share of such items, derived from New York sources are selected. Section 632 of the Tax Law provides:

"(a) The New York adjusted gross income of a nonresident individual shall be the sum of the following:

(1) The net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources, including:

(A) his distributive share of partnership income, gain, loss and deductions, determined under section six hundred thirty-seven,...".

C. That the New York adjusted gross income of a nonresident partner includes "only the portion derived from or connected with New York sources of such partner's distributive share of items of partnership income, gain, loss and deduction entering into his federal adjusted gross income...". Tax Law section 637(a).

D. That if a partnership carries on a profession both within and without New York State, "the items of income, gain, loss and deduction attributable to such... profession... must be apportioned and allocated to this State on a fair and equitable basis...". An allocation percentage derived from a three factor formula of property, payroll and gross income is applied to the partnership's items of income, gain, loss and deduction to determine the partnership portion allocable to New York sources. 20 NYCRR section 131.13.

E. That "(t)he New York adjusted gross income of a nonresident partner shall include his distributive share of all items of partnership income, gain, loss and deduction entering into his Federal adjusted gross income to the

extent such items are derived from or connected with New York sources, i.e., attributable to ...(a) profession... carried on in this State...". 20 NYCRR section 134.1.

F. That any modifications described in Tax Law section 612(b) or (c), which relate to an item of partnership income, gain, loss, or deduction, must be made in accordance with the partner's distributive share for federal income tax purposes of the particular item, but the modification is limited to the portion of the particular item derived from or connected with New York sources. Tax Law section 637(c).

G. That Tax Law section 612(b) provides for various modifications increasing federal adjusted gross income. It does not require the adding back of the \$25,000.00 exclusion from federal gross income authorized by Internal Revenue Code section 911. "The necessity for add-backs to overcome the effect of federal exclusions is recognized in Section 637 (subd. c), which requires modification of a nonresident partner's income pursuant to section 612. Yet section 612 (subd. b), which meticulously provides in some 22 separate paragraphs... for such addbacks, says nothing about the \$25,000.00 federal exclusion from a nonresident's earned income." In the Matter of Richard B. and Kathanne H. Webster, et al, 56 N.Y.2d 532, 535 (Ct. App. 1982).

H. That the result approved by the Court of Appeals in Webster may be ensured in the matter at hand by segregating the portion of the Internal Revenue Code section 911 exclusion which is attributable to petitioner's Coudert Brothers income from the portion attributable to his Coudert Freres income. Petitioner's New York State partnership source income is to be computed by taking his Federal partnership distributive share of Coudert Brothers

income, less the portion of the section 911 exclusion applicable thereto, and multiplying it by the three factor formula percentage.

I. That in the instant case, the amount includible as net earnings from self-employment for the purpose of Chapter 46, Title U of the Administrative Code of the City of New York for 1976 and 1977 is the petitioner's partnership distribution from Coudert Brothers less the allocated portion of the section 911 exclusion multiplied by the partnership allocation percentage, except that for the year 1977 the deduction which is not allowed pursuant to section 280C of the Internal Revenue Code shall be allowable.

J. That the petitioners' 1977 New York State Income Tax Nonresident Return and City of New York Nonresident Earnings Tax Return were timely filed in accordance with Finding of Fact "13".

K. That the petition of E. Ernest Goldstein and Peggy R. Goldstein is granted to the extent that the penalty imposed pursuant to section 685(a) of the Tax Law is cancelled and also to the extent that the Department of Taxation and Finance is directed to allocate the Internal Revenue Code section 911 exclusion to petitioners' New York income as provided in Conclusions of Law "H" and "I". The petition is otherwise denied and the notices of deficiency, except as modified hereby, are sustained.

DATED: Albany, New York

NOV 26 1982

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER